

Preliminary Draft
of
Proposed Amendments
to the
Federal Rules
of
Practice and Procedure

SUBMITTED FOR PUBLIC COMMENT

Comments Due by February 15, 2005

Administrative Office of the U. S. Courts

Leonidas Ralph Mecham, Director

**A SUMMARY FOR BENCH AND BAR
(AUGUST 2004)**

REQUEST FOR COMMENT ON PROPOSED
AMENDMENTS TO THE FEDERAL RULES
OF PRACTICE AND PROCEDURE

The Judicial Conference's Advisory Committees on Bankruptcy Rules, Civil Rules, Criminal Rules, and Evidence Rules have proposed amendments to various rules and forms and are seeking public comment on the proposed changes.

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) **has not approved these proposals** but submits them for public comment. The proposals have not been presented to the Judicial Conference or the Supreme Court.

The full text of the proposed rules amendments and explanatory Committee Notes are set out in the *Request for Comment* pamphlets, which are posted at <www.uscourts.gov/rules> and are available on request from the Secretary to the Standing Committee. The synopses on the following pages highlight the major aspects of the proposed Bankruptcy, Civil, Criminal, and Evidence Rule amendments.

The rules committees welcome all comments, whether favorable, adverse, or otherwise. All comments from the public on these proposals will be considered carefully by the respective rules committees, which consist of experienced trial and appellate lawyers, scholars, and judges.

Written comments or comments sent electronically must be received by the Secretary to the Standing Committee **no later than February 15, 2005**. Comments may be sent electronically to <www.uscourts.gov/rules>.

An opportunity is also provided to the public to appear at scheduled public hearings to testify regarding the proposals. Requests to appear at a public hearing must be received by the Secretary to the Standing Committee no later than 30 days prior to the scheduled date for the public hearing. Information on the Secretary's mailing address and the dates and places of the scheduled public hearings is set out at the end of this brochure.

Under the proposed schedule, the rules amendments would become effective on December 1, 2006, —following the public comment period—they are in turn approved, with or without revision, by the relevant advisory committee, the Standing Committee, the Judicial Conference, and the Supreme Court, and if they are not altered by Congress.

I. Proposed Amendments to the Federal Rules of Bankruptcy Procedure:

Rule 1009 (Amendments of Voluntary Petitions, Lists, Schedules and Statements) would be amended to require the debtor to submit a corrected statement of social security number when the debtor becomes aware that the social security number previously submitted under Rule 1007(f) to the court is incorrect.

The proposed amendment to **Rule 2002** (Notice to Creditors, Equity Security Holders, United States, and United States Trustee) is intended to facilitate the transmission of notices to creditors by permitting a Notice Provider and the creditor to agree on the manner and address to which notices may be given. The address supplied by the creditor is conclusively presumed to be a proper address for the notice.

Amended **Rule 4002** (Duties of Debtor) implements § 521 (3) and (4) of the Bankruptcy Code, and requires the debtor to bring specified documentation of income, recently filed federal income tax return, and financial assets to the § 341 meeting of creditors.

The proposed amendments to **Rule 5005** (Filing and Transmittal of Papers) update the rule by authorizing the district judge and clerk of the bankruptcy appellate panel to transmit erroneously delivered papers to the bankruptcy court clerk and the United States trustee.

Rule 7004 (Process; Service of Summons; Complaint) is amended to revise the method of service of a summons and complaint on the attorney for the debtor whenever an entity serves the debtor with a summons and complaint. The amendment makes clear that the debtor's attorney must be served with a copy of any summons and complaint filed against the debtor without regard to the manner in which the summons and complaint was served on the debtor, including personal service. Under the current rule, the debtor's attorney must be served only if the complaint and summons was served on the debtor by mail.

The proposed amendment to **Rule 9001(g)** (General Definitions) adds a definition of "Notice Provider." The definition is proposed in conjunction with the amendment to Rule 2002.

Amended Rule 9036 (Notice by Electronic Transmission) deletes the requirement that the sender of electronic notice receive confirmation that the notice was received. The proposed amendment makes clear that notice is complete upon its transmission.

Schedule I of Official Form 6 (Schedules) is amended to require the disclosure of the current income of the non-filing spouse of a debtor in a chapter 7 case.

II. Proposed Amendments to the Federal Rules of Civil Procedure:

A. Electronic Discovery. For years, bar associations, attorneys, and members of the public have urged the Advisory Committee on Civil Rules to address the serious problems arising from the increasingly frequent use of discovery of electronic information.

The proposed amendments address five related areas: (a) early attention to issues relating to electronic discovery, including the form of production, preservation of electronically stored information, and review of electronically stored information for privilege; (b) discovery of electronically stored information that is not reasonably accessible; (c) the assertion of privilege after production; (d) the application of Rules 33 and 34 to electronically stored information; and (e) a limit on sanctions under Rule 37 for the loss of electronically stored information as a result of the routine operation of computer systems. In addition, amendments to Rule 45 are made to correspond to the proposed changes in Rules 26-37.

The proposed amendments to **Rule 16** (Pretrial Conferences; Scheduling; Management) and **Rule 26** (General Provisions Governing Discovery; Duty of Disclosure) set up a framework for the parties and court to give early attention to issues pertaining to the disclosure and discovery of electronic information. Under the proposed amendments to Rule 26(f), the parties must discuss during the discovery-planning conference any issues relating to the disclosure and discovery of electronically stored information, including the form of production, and also discuss issues relating to the preservation of electronically stored information and other information. The amendment also calls for discussion of whether the parties can agree to production on terms that protect against privilege waiver. **Form 35** (Report of Parties' Planning Meeting) would be amended to reflect the Rule 26(f) changes. Under amended Rule 16, the scheduling order may include provisions on the disclosure or discovery of electronically stored information and may adopt the parties' agreements for protection against waiving privilege.

Under the proposed amendments to Rule 26(b)(2)(C), a party need not provide electronically stored information in response to a discovery request if the information is not reasonably accessible. If the requesting party moves to compel discovery of such information, the responding party must

demonstrate that the information is not reasonably accessible. If that showing is made, the court may still order the party to provide the information, if the requesting party shows good cause. After good cause is shown, the court may – as with any discovery – impose conditions and terms on the discovery of electronically stored information that is not reasonably accessible.

Proposed Rule 26(b)(5)(B) sets up a procedure for a party to assert that it has produced privileged information without intending to waive the privilege. The proposed rule allows the party who has responded to a discovery request to notify the receiving party that it is asserting a privilege within a reasonable time after production. After receiving notification, the receiving party must return, sequester, or destroy the information, and may not disclose it to third parties. The producing party must preserve the information and put it on a privilege log, pending the court's ruling, on a motion to compel, whether the information is, in fact, privileged and whether any privilege has been waived or forfeited by production. The proposed rule does not address whether there has been a privilege waiver.

Proposed amendments to **Rule 33** (Interrogatories to Parties) and **Rule 34** (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes) clarify their application to electronically stored information and provide a framework for resolving disputes. The Rule 33 amendments make it explicit that an answer to an interrogatory involving review of business records should involve a search of electronically stored information and permit the responding party to answer by providing access to that information. The Rule 34 amendments distinguish between electronically stored information and “documents,” expansively defining each to avoid limitation to existing technologies. The amendments to Rule 34(b) also permit the requesting party to specify the form in which electronically stored information is to be produced and permit the responding party to object to the requested form. If there is no request for a specific form for producing electronically stored information, and if the parties do not agree to a particular form and the court does not order one, the producing party has two options: to produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form. Absent court order or party agreement, the responding party need only produce the information in one form.

Amended **Rule 37** (Failure to Make Disclosure or Cooperate in Discovery; Sanctions) adds a new subdivision (f) that protects a party from sanctions under the Civil Rules for failing to provide electronically stored information lost because of the routine operation of the party's computer system. This limited “safe harbor” is not available if the party violated an order issued in the action requiring it to preserve electronically stored information, or if the party failed to take reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action. This new section addresses a unique and necessary feature of computer systems – the automatic recycling, overwriting, and alteration of electronically stored information. The advisory committee is continuing to examine the degree of culpability or fault that will defeat safe harbor protection in this narrow area.

The proposed amendments to **Rule 45** (Subpoena) are technical in nature and conform to changes in other discovery rules relating to discovery of electronically stored information.

B. Civil Forfeiture. Proposed new **Supplemental Rule G** (Forfeiture Actions in Rem) establishes comprehensive procedures governing in rem forfeiture actions. The new rule consolidates the forfeiture procedures scattered through the Supplemental Rules and creates a unified procedural framework intended solely to address civil asset forfeiture cases. Among other things, the proposed new rule sets out procedures governing the filing of and response to complaints involving in rem forfeitures; specifies notice provisions, including the anticipated use of a designated government internet forfeiture site as a more reliable means of publishing notice; limits

the government's use of early discovery requests; and establishes procedures to ensure early determination of a claimant's standing. Conforming amendments to **Supplemental Rule A** (Scope of Rules), **Supplemental Rule C** (In Rem Actions; Special Provisions), **Supplemental Rule E** (Actions in Rem and Quasi in Rem: General Provisions), and **Rule 26** (General Provisions Governing Discovery; Duty of Disclosure) are also proposed.

C. Motion for Judgment as a Matter of Law. The proposed amendment to **Rule 50** (Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings) removes a longstanding procedural trap and permits renewal after trial of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion made before the close of all the evidence be renewed at the close of all the evidence. Separately, the proposed amendment adds a time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict on an issue addressed by the motion.

III. Proposed Amendments to the Federal Rules of Criminal Procedure:

The proposed amendments to **Rule 5** (Initial Appearance), **Rule 32.1** (Revoking or Modifying Probation or Supervised Release), and **Rule 41** (Search and Seizure) permit the government to transmit certain documents, including copies of a judgment, warrant, or warrant application to the court by reliable electronic means in specified proceedings. The proposals recognize that a growing number of courts are accepting electronic filings and reflect the significant improvements in technology.

The proposed amendments to **Rule 40** (Arrest for Failing to Appear in Another District) fill a gap in the rules and expressly authorize a magistrate judge in the district of arrest to set conditions of release for an arrestee who not only fails to appear but also violates any other condition of release. The advisory committee concluded that it would be inconsistent to empower a magistrate judge to release an arrestee who had failed to appear altogether, but not to release one who violated conditions of release in a minor way.

Amended **Rule 58** (Petty Offenses and Other Misdemeanors) eliminates a conflict between the rule and Criminal Rule 5.1 concerning the right to a preliminary hearing and clarifies the advice that must be given to a defendant during an initial appearance.

IV. Proposed Amendments to the Federal Rules of Evidence:

Under amended **Rule 404** (Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes), evidence of a person's character is never admissible to prove conduct in a civil case. The advisory committee concluded that a clear rule is necessary to resolve a conflict in the case law and avoid the serious risks of prejudice, confusion, and delay that may arise when character evidence is used to prove that a person acted in conformity with the character trait.

The proposed amendments to **Rule 408** (Compromise and Offers to Compromise) resolve three longstanding conflicts in the courts about statements and offers made in settlement negotiations admitted as evidence of fault or used for impeachment purposes. First, the proposed amendments provide that statements of fault made during the course of settlement negotiations are not barred in a subsequent criminal case. Such statements may be critical evidence of guilt. Although statements of fault are admissible in subsequent criminal litigation, an actual settlement is not admissible to prove the validity or amount of the underlying claim. Second, the proposed amendments prohibit the use of statements made during settlement negotiations when offered to impeach a witness

through a prior inconsistent statement or through contradiction. Third, the proposed amendments bar a party from introducing its own statements and offers of compromise made during settlement negotiations.

Rule 606 (Competency of Juror as Witness) would be amended to clarify that juror testimony may be received only for very limited purposes, including to prove that the verdict reported was the result of a clerical mistake. The proposed amendment does not prevent the court from polling the jurors and taking steps to remedy any error that seems obvious when the jury is polled.

The proposed amendment to **Rule 609** (Impeachment by Evidence of Conviction of Crime) resolves a conflict among the courts about whether a particular conviction involves dishonesty or false statement that can automatically be used to impeach the witness. The proposed amendment permits automatic impeachment only when an element of the crime requires proof of deceit or if the underlying act of deceit readily can be determined from such information as the charging instrument.

Public hearings are scheduled to be held on the amendments to

- Bankruptcy Rules in Washington, D.C., on February 3, 2005, and in San Francisco, California, on February 7, 2005;
- Civil Rules in San Francisco, California, on January 12, 2005, in Dallas, Texas, on January 28, 2005, and in Washington, D.C., on February 11, 2005;
- Criminal Rules in Tampa, Florida, on January 21, 2005, and in Washington, D.C., on February 4, 2005; and
- Evidence Rules in San Francisco, California, on January 15, 2005, and in New Haven, Connecticut, on January 27, 2005.

Those wishing to testify should contact the Secretary at the address below in writing at least 30 days before the hearing.

All written comments on the proposed rule amendments should be mailed to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Comments on the proposed rule amendments may also be sent electronically to <www.uscourts.gov/rules>.

In accordance with established procedures all comments submitted on the proposed amendments are available for public inspection.

The text of the proposed rule amendments and the accompanying Committee Notes can be found at the United States Federal Courts' Home Page at <www.uscourts.gov/rules>. For further information, copies of this brochure, the *Request for Comment* pamphlets, and other materials, contact:

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